COMMONWEALTH'S ATTORNEYS' SERVICES COUNCIL
*Training Virginia's Prosecutors for the 21st Century*

# 2014 VIRGINIA APPELLATE UPDATE FOR LAW ENFORCEMENT

## Contents



## I. Constitutional Law: Fourth Amendment – Search & Seizure

### U.S. Supreme Court

***Bailey v. United States*, 133 S.Ct. 1031, 568 US ____ (2013).**

*Facts:* While police prepared to execute a warrant to search an apartment, two men were seen leaving the premises. Police followed the men, stopped them about a mile away, and performed patdown searches. Keys to the apartment were found on Bailey, who denied living in the apartment until informed of the search warrant, and both men were arrested. The District Court denied Bailey's motion to suppress the apartment key and Bailey's statements during the stop, and held that under *Michigan v. Summers*, 452 U.S 692 (1981) the stop was a detention incident to the execution of search warrant. The Second Circuit affirmed the District Court's denial of Bailey's motions.

*Held:* Reversed and remanded. The rule of *Michigan v. Summers*, 452 U.S. 692 (1981), which allows officers executing a search warrant to detain the occupants of the premises without further showing, is limited to the immediate vicinity of the premises to be searched, and thus did not apply where the defendant had left the apartment before the search began and was detained nearly a mile away. Factors that courts may consider to determine if the rule of *Summers* applies include the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, and the ease of reentry from the occupant's location.

***Fernandez v. California*, 134 S.Ct. 1126, 571 US ___ (2014).**

*Facts:* Police observed Fernandez—a violent robbery suspect—run into an apartment, and heard screams from Rojas, who lived there. Before police arrested Fernandez, he refused to allow the apartment to be searched. Rojas later gave written and oral consent for police to search the apartment, which led to a finding of evidence linking Fernandez to the robbery.

*Held:* Because defendant was not present when Rojas consented, *Georgia v. Randolph*, 547 U.S. 103 (2006) did not apply. Police could conduct warrantless search of defendant's apartment following his arrest based on consent to the search by a woman who also occupied the apartment, even though the defendant objected to the search prior to his arrest and was absent at the time of the woman's consent because of his arrest. Police were reasonable in removing defendant from the apartment so that they could speak with the woman, an apparent victim of domestic violence, outside of defendant's potentially intimidating presence, and had probable cause to place defendant under arrest for robbery.

***Florida v. Harris*, 133 S.Ct. 1050, 568 US ____ (2013).**

*Facts:* Probable cause was obtained to search defendant's truck after a trained narcotics dog alerted police to the driver's-side door handle. While no narcotics that the dog was trained to find were discovered, methamphetamine ingredients were found. In a subsequent stop while defendant was on bail, the same narcotics dog alerted on defendant's truck, but nothing of interest was found. At a suppression hearing, defendant questioned the dog's reliability, certification, and performance in the field.

*Held:* To establish that a drug detection dog is reliable, the state need not present an exhaustive set of records showing the dog's performance in the field. Evidence of a drug detection dog's satisfactory performance in a certification or training program that evaluates its proficiency in detecting drugs can itself provide sufficient reason to trust its alert, allowing a court to presume, subject to any conflicting evidence offered, that the dog's alert provides probable cause to search. The defendant must have an opportunity to challenge evidence of a drug detection dog's reliability, whether by cross-examining the testifying officer or by introducing his own fact or expert witnesses. Here training and testing records sufficiently established reliability of drug detection dog, where the dog had successfully completed two recent drug-detection courses and maintained its proficiency through weekly training exercises.

***Navarette v. California,* 134 S.Ct. 896, ___ US ___ (2014).**

*Facts:* Defendant, while carrying 30 pounds of marijuana in his pickup truck, ran another driver off the road. The other driver called 911 and reported the defendant's license plate number, direction, vehicle color, make and model, and the time that the driver last saw the defendant. The caller did not leave his name. Within minutes, officers located the defendant, whose vehicle matched the description given, and followed him for about five minutes, although they did not observe any unusual activity. The officers

stopped the vehicle, smelled marijuana, searched the truck, and found the contraband. At trial, the defendant complained the stop lacked reasonable suspicion.

*Held:* Affirmed. In a 5-4 ruling, the Court found that the 911 call, although technically an anonymous tip, provided the officers with reasonable suspicion to stop the vehicle. The Court first found that the 911 call, although anonymous, was sufficiently reliable to allow the officer to believe the caller. The caller claimed eyewitness knowledge, unlike the anonymous tipster in *Florida v. J.L.,* and provided a detailed description of the event and of the defendant. The police also were able to corroborate the location that the caller provided. The Court also placed great weight on the fact that the caller used the 911 call system, which has safeguards against false reporting that allow police to trace callers' locations and identities. The Court then found that the tip provided reasonable suspicion that criminal activity may be afoot. The Court found that the fact that the defendant ran the victim off the road gave rise to reasonable suspicion of drunk driving. The possibility that the driving behavior had another, innocent, explanation was irrelevant. The Court also found it irrelevant that the defendant drove lawfully and properly for five minutes while under police surveillance, noting that such behavior was to be expected while the police followed him. The Court noted that once the officer possessed reasonable suspicion to stop the defendant, his subsequent lawful behavior was irrelevant and the officer was not required to continue to wait before stopping him.

## U.S. Court of Appeals

***United States v. Black,* 707 F.3d 531 (4th Cir. 2013).**

*Facts:* Defendant was with five other men in a parking lot between two apartment complexes when officers approached the group. Defendant was cooperative and offered his ID card, which the officer pinned to his uniform. As officers gathered the other men's information, and secured a firearm on another individual, Black attempted to flee. One officer tackled Black, found a firearm, and arrested him. Black claimed he was unlawfully seized, and the seizure was not supported by reasonable articulable suspicion.

*Held:* Defendant was seized for purposes of the Fourth Amendment at the point when the officer pinned defendant's identification card to his uniform, and defendant's subsequent decision to leave was an effort to terminate an illegal seizure and did not negate the finding that a reasonable person in his circumstances would not have felt free to leave. To conclude that mere presence in a high crime area at night is sufficient justification for detention by law enforcement is to accept *carte blanche* the implicit assertion that Fourth Amendment protections are reserved only for a certain race or class of people. "The facts of this case give us cause to pause and ponder the slow systematic erosion of Fourth Amendment protections for a certain demographic."

The following are specific factors to consider in determining whether a reasonable person would feel free to leave include, such that the person was not seized within the meaning of the Fourth Amendment: (1) the number of police officers present at the scene; (2) whether the police officers were in uniform; (3) whether the police officers displayed their weapons; (4) whether they touched the defendant or made any attempt to physically block his departure or restrain his movement; (5) the use of language or tone of voice indicating that compliance with the officer's request might be compelled; (6) whether the officers informed the defendant that they suspected him of illegal activity rather than treating the encounter as routine in nature; and (7) whether, if the officer requested from the defendant some form of official identification, the officer promptly returned it.

***United States v. Green*, 740 F.3d 275 (4th Cir. 2014).**

*Facts:* Police stopped Green's vehicle due to possible excessive window tint, and a partially obscured license. Green was asked to accompany the officer to the patrol car while the license and registration were checked, and Green complied. After notification of a protective order against Green, he was questioned about any previous arrests and illegal drugs. A search dog sniffed the exterior of Green's car, and alerted the officers the presence of narcotics, where they found a duffle bag with over 1 kilogram of cocaine and $7000 cash. The entire stop lasted 14 minutes. Green was charged with intent to distribute, and moved to suppress the evidence by arguing that the scope and duration of the traffic stop was unreasonable and not justified by reasonable suspicion of criminal activity.

*Held:* 14-minute period of detention between initial stop of the defendant and alert by a drug-detection dog were reasonable given that police officer was performing records check and other functions related to the stop. In addition, dog was sufficiently reliable to sustain search. Although field performance reports showed that drugs were found only 22 of 85 times that the dog had alerted in field before alert on defendant's vehicle, the dog's success rate rose to 43% where officers found evidence that drugs or drug users had recently been in vehicle, and dog maintained a 100% success rate in controlled testing environments.

***United States v. Watson*, 703 F.3d 684 (4th Cir. 2013).**

*Facts:* Police observed a suspected drug transaction outside of the building where defendant lived and worked. While a search warrant was being obtained for the building, police kept defendant (who was not involved in the suspected drug transaction) in the back area of the store for three hours. Defendant was not questioned about the criminal activity nor informed that he was free to leave. After obtaining the warrant, a revolver and ammunition were found in defendant's room, and defendant stated that the gun "doesn't even work." Defendant moved to suppress that statement as the product of an illegal arrest, and claimed that he was unlawfully detained.

*Held:* The defendant's Fourth Amendment rights were violated when he was detained for three hours while a search warrant for a building was obtained, where the police had no reason to believe that he was linked to any criminal activity and his detention was not justified by the need to preserve evidence or concern for officer safety.

***United States v. Williams*, 740 F.3d 308 (4th Cir. 2014).**

*Facts:* An officer observed defendant's car stopped in the middle of a residential road while an individual spoke to the driver. The car remained in the road for about a minute after the individual walked away, so the officer pulled over the car for obstructing traffic. The officer saw the driver remove an object from his pants, so the officer conducted a search and found a gun. Defendant was indicted on two counts related to the firearm, and moved to exclude the evidence since the traffic offense for the initial stop did not apply to the incident's residential location.

*Held:* Defendant's motion to exclude evidence was rejected. Police officer had probable cause to stop defendant's vehicle even though the conduct that the officer identified as illegal did not apply where the stop occurred; different section of state law supported stop.

***United States v. Yengel*, 711 F.3d 392 (4th Cir. 2013).**

*Facts:* Police arrived to defendant's residence after a call regarding domestic assault. Defendant's wife informed police that defendant kept a number of firearms and a grenade in the house. She directed officers to the room with the firearms, where they found a number of weapons. A search warrant was not obtained, no explosives experts were notified, and neither the defendant's house nor nearby residences were evacuated during the search. Defendant moved to suppress evidence gained from the warrantless search, and the Government argued that the search validly occurred under exigent circumstances.

*Held:* Officers did not have reasonable belief that exigency existed based on possible existence of a hand grenade in a closet, where they did not view threat as serious enough to warrant evacuation of a nearby child, and the threat was of a stable nature and in an inaccessible location. When determining whether an exigency reasonably justified a warrantless search, a court may consider, among other things: (1) the degree of urgency involved and the amount of time necessary to obtain a warrant; (2) the officers' reasonable belief that the contraband is about to be removed or destroyed; (3) the possibility of danger to police guarding the site; (4) information indicating the possessors of the contraband are aware that the police are on their trail; and (5) the ready destructibility of the contraband.

**Virginia Cases - Published**

***Fauntleroy v. Commonwealth*, 62 Va. App. 238, 746 S.E.2d 65 (2013).**

*Facts:* Officer stopped defendant's vehicle after observing it did not have a functioning brake light, as required. The vehicle was illegally parked in the middle of the road, impeding traffic, and also had a safety inspection sticker that had actually been issued for another vehicle. The officer called a tow truck to remove the vehicle, and conducted an inventory search, which revealed illegal drugs in the center console and trunk. Defendant moved to suppress the evidence found during the inventory search, claiming that because the vehicle was not lawfully impounded, the search violated the Fourth Amendment.

*Held:* Officer's decision to impound defendant's vehicle, which resulted in inventory search that yielded drugs, was objectively reasonable under Fourth Amendment. Officer deemed vehicle "not drivable" because of its inspection status, and was not required to ask defendant if he wished to have his vehicle moved to another location before impounding it.

***Jeffers v. Commonwealth*, 62 Va. App. 151, 743 S.E.2d 289 (2013).**

*Facts:* Police learned that child pornography had been posted online, and traced the uploading computer's IP address back to a residence. Police obtained a search warrant to search the property, which included both a trailer and a barn. Defendant lived in the barn and admitted to receiving internet service through a wire from the trailer. During the barn's search, defendant was detained, and police found a computer containing child pornography. Defendant claims that police were not allowed to search the barn, because once they discovered defendant lived there, it was no longer within the scope of the warrant.

*Held:* Search warrants are not directed at persons; they authorize the search of places and the seizure of things. Thus, the critical element in a reasonable search is not that the owner of the property is suspected of crime, but that there is reasonable cause to believe that the specific things to be searched

for and seized are located on the property to which entry is sought. Officers properly searched barn pursuant to warrant and were not required to stop simply because they discovered that someone was living in it.

***Murry v. Commonwealth*, 62 Va. App. 179, 743 S.E.2d 302 (2013)**.

*Facts:* Defendant was convicted of rape and five counts of sexual battery against his stepdaughter. His 156 year sentence was suspended to an active term of 16 years and 7 months, with a probation condition that defendant shall submit to a search of his person and property at any time, with or without a search warrant, for the entire period of his suspended sentence. Defendant objected to this condition.

*Held:* The trial court's imposition of suspicionless searches for the remainder of his life was reasonable in light of sex offense convictions, which demonstrated a need for increased supervision upon release from incarceration.

***Rideout v. Commonwealth,* 62 Va. App. 779, 753 S.E.2d 595 (2014).**

*Facts:* Police traced a collection of child pornography files from a file-sharing program back to defendant's IP address. Defendant claimed that he had been using the software under the mistaken impression that he set it up such that other users were prevented from gaining access to files on his computer, and that he had a reasonable expectation of privacy after despite the program's primary purpose of sharing information with other users.

*Held:* Defendant lacked a reasonable expectation of privacy in files located on his personal computer where he had installed and used software specifically designed for sharing of files over the internet. By installing peer-to-peer file sharing software on his computer, defendant assumed risk that other users of such software, including police, could readily access incriminating files that could be shared through such software. Thus, police did not act improperly in obtaining files containing child pornography from defendant's personal computer.

***Ross v. Commonwealth*, 61 Va. App. 752, 739 S.E.2d 910 (2013)**.

*Facts:* Defendant sought additional visitation with his daughter, who was in her mother's physical custody. Because defendant was a convicted felon, the court ordered a social worker conduct an unannounced visit in order to conduct a "home study" for the court. When the social worker arrived at defendant's reside, defendant became visibly upset and agitated, and did not want the social worker to enter his home. An unmarked police car approached, and defendant ran into his residence. Although no one observed defendant commit a criminal act, police entered the home, handcuffed defendant, and made a protective sweep of the residence. Marijuana and various firearms were discovered in plain view and seized. Defendant moved to suppress the incriminating evidence and claims that the officers' warrantless entry violated the Fourth Amendment.

*Held:* This search violated the Fourth Amendment. The emergency exception to the warrant requirement did not apply because there was no emergency, and the community caretaker exception to the warrant requirement did not apply because there was no indication of danger either to social worker or to the father's children. Officers did not observe the father commit any criminal act and had no probable cause to arrest him for any crime.

**Virginia Cases - Unpublished**

***Hill v. Commonwealth*, February 4, 2014**
Court of Appeals of Virginia, unpublished

Halifax: Defendant appeals his conviction for Possession of a Firearm by Felon on Fourth Amendment grounds.

*Facts:* Defendant, a felon, pulled his shotgun from the trunk of his car and put it in the seat next to him while he sat, parked, facing a bank, and ate pizza. A bank teller nearby witnessed this behavior and, finding it suspicious, called the police. An officer responded and detained the defendant. When another officer responded, that officer recognized the defendant as a convicted felon.

*Held*: Affirmed. While the Court agreed that mere possession, in public, of a shotgun is not illegal, in this case the behavior was suspicious. The defendant was parked in a parking lot, far from any place where he could legally operate the firearm. In addition, he had parked in a remote location, away from any nearby store or business, and parked facing the bank. The Court found reasonable suspicion that criminal activity was afoot.

***Creekmore v. Commonwealth*, February 11, 2014**
Court of Appeals of Virginia, unpublished

King George: Defendant appeals his conviction for Driving Revoked, 3rd Offense, on Fourth Amendment grounds.

*Facts:* Defendant stopped his car behind a police car in an undeveloped subdivision near a wooded area. The officer in the car shined his spotlight on the defendant, then turned it off and walked up to the defendant and spoke to him, asking him for identification. The defendant stated he did not have his driver's license. When the officer ran the defendant in order to cite him for driving without a license in possession, he learned the defendant's license was revoked.

*Held:* Affirmed. The Court found that the initial encounter with the defendant was consensual. The Court rejected the argument that, by using his spotlight, the officer "seized" the defendant. The Court also observed that the officer in no way blocked the defendant's egress. Lastly, the Court rejected the argument that the officer seized the defendant by asking him for identification. By asking for the defendant's identification while he was stopped, the officer was not exercising any authority to do so, but merely requesting the defendant to voluntarily produce his license.

***Miles v. Commonwealth*, February 11, 2014**
Court of Appeals of Virginia, unpublished

Richmond: Defendant appeals his conviction for Possession with Intent to Distribute on Fourth Amendment grounds.

*Facts:* Officers approached and spoke to defendant, who was carrying heroin for sale, concerning why he was on public housing property at 3 am. The property was marked "no trespassing" and was a high-crime area. The defendant appeared nervous and turned his body away from the officers, especially an area that appeared to bulge at his waistband. The officer asked for permission to pat the defendant down

and the defendant, saying nothing, raised his hands in the air. However, when the officer reached the "bulge" the defendant lowered his arms repeatedly to prevent the officer from patting the area. Officers attempted to handcuff the defendant, resulting in a struggle. After handcuffing the defendant, the officers located a hard object that the officer believed was a weapon. However, it turned out to be a cellphone and a bag of crack.

*Held:* Affirmed. The Court found that the officers had reasonable suspicion to believe that the defendant had a weapon and were therefore entitled to pat the defendant down. The Court found that, under the totality of the circumstances, there was sufficient evidence that the defendant appeared to be armed. When the officer found an item that he believed could be a weapon, he was entitled to remove and examine the object.

***Commonwealth v. Mosley*, February 11, 2014**
Court of Appeals of Virginia, unpublished

Norfolk: The Commonwealth appeals the granting of a motion to suppress on Fourth Amendment grounds.

*Facts*: Officers observed the defendant, a felon whom they knew to be a habitual trespasser, walking alone on public housing property, in violation of the no-trespassing rules. They officers spoke to the defendant and, while speaking to him, the defendant repeatedly put his hands in his pockets in defiance of the officers' instructions. The officers also noted that the defendant fit the description of an incident at a unit from the night before, the same unit the defendant stated he was planning to visit. The officers decided to pat the defendant down, but when they tried to do so, the defendant resisted and a struggle ensued. During the struggle, the officers noticed that the defendant had a handgun in his jacket. The trial court granted a motion to suppress, finding a lack of reasonable suspicion for the pat-down.

*Held:* Suppression reversed. The Court ruled that the offices had reasonable suspicion to conduct a pat-down, noting that the defendant appeared to be a suspect in a recent incident and also was trespassing. The Court also noted that the defendant appeared nervous and repeatedly put his hands in his pockets in defiance of instructions. The Court took pains to distinguish the *Roulhac* case, in which it held that simply placing one's hands in one's pockets is not sufficient to justify a pat-down. In this case, the Court noted that the totality of the circumstances gave the officers reason to believe the defendant was armed.

***Burgess v. Commonwealth*, March 11, 2014**
Court of Appeals of Virginia, unpublished

Southampton: Defendant appeals his conviction for Grand Larceny on Fourth Amendment grounds.

*Facts*: Defendant stole a laptop computer from a person and later stole equipment from a fire station parking lot. A police officer investigating the fire lot theft obtained a search warrant seeking the missing equipment and executed it at the defendant's residence. While searching for the missing equipment, the officer located a computer bag which, although it did not contain any of the missing equipment, did contain a laptop computer and an ID badge belonging to someone else. The computer bag was located among other stolen items that were clearly set aside in the defendant's residence from other property. The officer took the computer to his office, read the serial number, contacted the victim, and determined that the defendant had stolen the laptop.

*Held*: Affirmed. The Court first reviewed the "plain view" doctrine and distinguished this case from *Arizona v. Hicks*, a US Supreme Court case where an officer had moved equipment to read the serial number on a stereo. In this case, the Court first noted that the officer lawfully could look into the laptop bag, which could have contained the stolen property he was seeking. The Court then noted that, upon seeing the items in plain view, the officer had probable cause to believe that the laptop was stolen, given that it was among other stolen property and was in a bag with someone else's identification.

***Ballard v. Commonwealth*, April 1, 2014**
Court of Appeals of Virginia, unpublished

Newport News: Defendant appeals his convictions for Drug Possession on Fourth Amendment grounds.

*Facts:* Defendant was carrying drugs when he failed to stop at a red light. Officers stopped the defendant and brought a drug dog to the stop. The dog alerted at the defendant's door. The defendant denied that there were drugs in the car but admitted to having consumed marijuana earlier in the day. Searching the car, officers located a single marijuana seed underneath the driver's seat. The officers then searched the defendant and located cocaine and marijuana.

*Held:* Affirmed. The Court distinguished this case from the *Whitehead* case by pointing out that in this case, there was individualized suspicion that the defendant personally possessed drugs. The dog alerted on the defendant's door, a seed was underneath his seat, and he admitted to having consumed marijuana recently. The Court therefore found a "fair probability" that the defendant would have contraband on his person.

## II. Constitutional Law: Fifth Amendment – Confessions & Self-incrimination

### U.S. Supreme Court

***Salinas v. Texas*, 133 S. Ct. 2174 (2013) (plurality opinion).**

*Facts:* Defendant was neither placed in custody, nor received *Miranda* warnings before voluntarily answering an officer's questions regarding a murder. However, his silence after being asked whether ballistics testing would match his shotgun to the shell casings at the crime scene were used in his murder trial as evidence of guilt. Defendant was convicted of murder, and claims that the use of his silence violated the Fifth Amendment.

*Held:* A witness who desires protection of privilege against self-incrimination must claim it. Fifth Amendment did not prohibit prosecution from commenting on defendant's silence in response to noncustodial police questioning as evidence of his guilt; defendant was required to expressly invoke the privilege against self-incrimination in order to subsequently benefit from it. Due process prohibits prosecutors from pointing to the fact that a defendant was silent after receiving *Miranda* warnings, but that rule does not apply where suspect has not received the warnings' implicit promise that any silence will not be used against him.

**U.S. Court of Appeals**

***United States v. Johnson*, 734 F.3d 270 (4th Cir. 2013)**

*Facts:* Officers pulled over defendant's vehicle after witnessing the car weaving and having an illegible temporary registration tag. Defendant consented to a vehicular search after the officer smelled marijuana, and two bags were subsequently discovered in the defendant's mouth. While arrested and seated in the police car, and before *Miranda* warnings were given, defendant voluntarily stated that he had information that could help the officers. The Detective responded, "What do you mean?" to which defendant stated "I can get you a gun." Defendant was then given a *Miranda* warning and advised not to say anything until they reached the police station. Defendant claims that the Detective's question constituted an unwarned custodial interrogation in violation of *Miranda*.

*Held:* Detective's question to defendant, "What do you mean?" was not reasonably likely to elicit an incriminating response, and thus did not equate to unwarned custodial interrogation in violation of *Miranda*. Detective's question was not interrogation because a reasonable officer could not anticipate that defendant would attempt to "extricate himself from a misdemeanor by implicating himself in a felony."

***United States v. Hashime*, 734 F.3d 278 (4th Cir. 2013)**

*Facts:* Law enforcement agents executed a search warrant in defendant's residence for evidence of child pornography. Defendant was rousted from bed at gunpoint to a house swarming with agents, separated from his family, and placed in a small basement storage room with two agents, and questioned by investigators for three hours. Agents made isolated statements that defendant was not under arrest and was free to leave, and the defendant had a cooperative demeanor ("I love helping cops. I've always loved cops. I always wanted to be a cop").

*Held:* Defendant was in custody for the purposes of Miranda. Although a statement that the individual being interrogated is free to leave may be highly probative of whether, in the totality of the circumstances, a reasonable person would have reason to believe he was in custody for *Miranda* purposes, such a statement is not sufficient in and of itself to show a lack of custody. Agents' isolated statements that defendant was not under arrest and was free to leave, and defendant's cooperative demeanor did not negate custodial nature of interrogation.

**Virginia Cases – Published**

***Robinson v. Commonwealth*, April 29, 2014**
Court of Appeals of Virginia, Record No. 0207-13-1

Hampton: Defendant appeals his convictions for Robbery, Use of a Firearm, and Malicious Wounding on Fifth Amendment grounds.

*Facts:* Defendant, 15 years old, shot and robbed a man. Police located and arrested the defendant, brought him to the station, put him in an interview room, gave him a drink, and informed him of his *Miranda* rights. The defendant waived his rights and spoke to the detective. However, during the interview he asked for his mother. The detective told the defendant he had already been certified as an adult before and was a "man" now and could speak to his mom after he went to jail. The defendant asked for his mother again repeatedly but the detective refused. Finally, after about thirty minutes, the

defendant started to cry and confessed. At trial, the defendant moved to suppress his statement. He presented evidence that he was learning disabled.

*Held:* Affirmed. The Court ruled that denying a juvenile's request to speak to his parent did not render the statement involuntary. The Court noted that the presence of a parent is one factor but is not dispositive of whether a confession is voluntary under the Fifth Amendment. The Court likened this case to the *Potts* case, noting that there was nothing inherently coercive or overbearing about this interview. Although the Court found that the detective was incorrect in stating that the defendant was legally an adult, the Court found it significant that the defendant had previous experience with the criminal justice system.

**Virginia Cases – Unpublished**

***Commonwealth v. McCray*, November 26, 2013**
Court of Appeals of Virginia, unpublished

Stafford: The Commonwealth appeals a motion to suppress on Fifth Amendment grounds.

*Facts*: Defendant stole property from Walmart. While he was fleeing, police stopped his vehicle with emergency lights. Police did not block his vehicle but told him that he was not free to leave. During the investigation, officers arrested the defendant's cohort for providing false information. They also patted down the defendant and questioned him about the larceny. After approximately 30 minutes of investigation, the defendant confessed to his involvement in the larcenies. The trial court suppressed the defendant's confession on the grounds that he was in custody at the time and the officers did not advise him of his *Miranda* warnings.

*Held*: Reversed, motion to suppress should not have been granted. The Court repeated that if a reasonable person in the suspect's position would have understood that he or she was under arrest, then *Miranda* warnings must be given before police questioning. However, a mere *Terry* stop does not necessarily require *Miranda* warnings. The Court distinguished the *Hasan* case, where 6 officers surrounded a suspect with guns drawn during a *Terry* stop, requiring *Miranda* warnings. In this case, only 2 officers questioned the defendant and the officers did not physically restrain him or detain him for an unreasonable amount of time.

## III. Crimes against the Person/Domestic Violence

**Virginia Cases - Published**

***Burkeen v. Commonwealth*, October 31, 2013**
Supreme Court of Virginia, 286 Va. 255, 749 S.E.2d 172 (2013)

Newport News: Defendant affirmed defendant's conviction of Malicious Wounding by ruling evidence was sufficient to establish intent to maliciously wound, even though the injury was caused by a single blow to the face.

*Facts:* After initiating a pool hall argument, defendant punched victim in the face resulting in "fractures of the orbit, the malar region, which is a series of bones around the cheek, and nasal fractures." Victim required major reconstructive surgery for the injuries caused by "significant force."

*Held:* Under ordinary circumstances, an intent to maim, as required in the crime of malicious wounding, may not be presumed from a blow with a bare fist. But an assault with a bare fist may be attended with such circumstances of violence and brutality that an intent to kill may be presumed. Evidence was sufficient to support finding of intent to maim where single punch to victim's head resulted in serious fracture of bones around cheek and nose requiring major reconstructive surgery and where defendant bragged of his strength and training while taunting and cursing the victim after first blow. In a prosecution for malicious wounding, it is proper for a court to consider not only the method by which a victim is wounded, but also the circumstances under which that injury was inflicted.

***Dawson v. Commonwealth*, May 27, 2014**
Court of Appeals of Virginia, Record No. 1226-13-2

Lancaster: Defendant appeals his conviction for Strangulation on sufficiency of the evidence.

*Facts:* Defendant, angry at the mother of his child, struck her and then pinned her with his arm, strangling her. As she lost consciousness, she was not able to say what happened next until she found herself on her knees on the ground, bleeding and gasping for air. After the attack, her ribs, chest, and sides of her neck hurt and she had bruises throughout her body. At the hospital, a nurse also observed injuries, including a ligature wound around her neck and a fractured rib. At trial, the defendant contended that the evidence did not demonstrate a sufficient "bodily injury" to prove felony strangulation.

*Held:* Affirmed. As before, the Court found that "bodily injury" has the same meaning in strangulation cases as it does in felony assault cases. Repeating that bodily injury means "any bodily hurt whatsoever," the Court analogized this case to the *Luck* case, where the victims suffered soft-tissue injuries. The Court also repeated that a victim need not experience any observable wounds, cuts, or breaking of the skin, nor broken bones or bruises. Instead, an injury need only be some detriment, hurt, loss, or impairment that could fairly be considered an injury to the human body.

**Virginia Cases – Unpublished**

***Wright v. Commonwealth*, February 18, 2014**
Court of Appeals of Virginia, unpublished

Dinwiddie: Defendant appeals his conviction for Violation of a Protective Order, 3rd Offense on sufficiency of the evidence.

*Facts:* After two previous convictions for the same offense, the defendant again violated a protective order. The protective order prohibited the defendant from having contact with or going onto the property of the victim. Hours after the defendant was released from jail on a previous offense, the victim heard a knock at her back window, then a knock at her front door. When she went to the window, she saw the defendant walking away at the edge of her yard. Another witness testified that the defendant also knocked on her door in the same neighborhood that night. A police officer located the defendant just after the offense about a block away from the victim's house.

*Held*: Affirmed. The Court found the circumstantial evidence sufficient.

***Cardenas-Najarro v. Commonwealth*, March 4, 2014**
Court of Appeals of Virginia, unpublished

Loudon: Defendant appeals his conviction for Violation of a Protective Order on sufficiency of the evidence.

*Facts:* Defendant, who had been served with a preliminary protective order, violated it by sending text messages to the victim. Defendant's wife obtained a preliminary protective order, which a Spanish-speaking Sheriff's deputy served on him the same day. In the next three days, the defendant sent three text messages to the victim. At trial, the defendant contended that he did not understand English, did not understand the Deputy's Spanish, and did not intend to violate the order. The Deputy did not testify at trial.

*Held:* Affirmed. The Court first rejected the defendant's contention that he had any right to have the protective order explained to him in his native language. The Court ruled that the Commonwealth must only prove that the order was served and that, once the defendant was served, he had legal notice of the contents of the order. The Court also rejected the defendant's argument that he did not "intend" to violate the order, noting that he had spoken English at work for many years and, according to his wife, appeared to understand the Deputy's Spanish when the Deputy spoke to him.

***Moore v. Commonwealth*, May 8, 2014**
Court of Appeals of Virginia, unpublished

Suffolk: Defendant appeals his conviction for Strangulation on sufficiency of the evidence.

*Facts:* Defendant attacked his girlfriend, striking her and then choking her. She suffered a small scratch on her neck, minor swelling of her forehead, and had blood on her left shoulder. She later suffered swelling on her neck that she attributed to the strangulation. At trial, the defendant argued that there was insufficient evidence to demonstrate bodily injury.

*Held:* Affirmed. The Court examined §18.2-51.6, which requires proof of "bodily injury" to prove strangulation. The Court found that the meaning of that term is the same as in §18.2-51 and therefore includes soft tissue injuries. However, the Court noted that "bodily injury" means any "bodily hurt" whatsoever and does not require proof of medical attention or residual effects. In this case, the defendant's attack caused soft tissue injury including swelling and therefore was sufficient.

## IV. Crimes against Property/Fraud

### Virginia Cases - Published

***Dennos v. Commonwealth*, March 11, 2014**
Court of Appeals of Virginia, Record No. 0635-13-1

Portsmouth: Defendant appeals his convictions for Construction Fraud on sufficiency of the evidence.

*Facts*: Defendant stole money by promising to fix a roof that he then did not fix. Defendant took payment in advance from the victim but never returned to the residence. The victim called the defendant many times, but despite many promises the defendant never delivered any shingles, hired any workers, or did any work. Ultimately the victim discovered that the defendant's address was, in fact, vacant. When she sought a second opinion, she learned that the roof did not, in fact, need the contracted repair at all.

*Held*: Affirmed. The Court reviewed the previous cases on construction fraud and found that, in this case, the evidence demonstrated that the defendant did absolutely nothing after receiving money for a repair that the victim did not need and then did not respond despite dozens of phone calls.

***Leftwich v. Commonwealth,* February 5, 2013**
61 Va. App. 422, 737 S.E.2d 42 (2013).

To establish the statutory crime of embezzlement, it is necessary to prove that the accused wrongfully appropriated to her use or benefit, with the intent to deprive the owner thereof, the property entrusted to her by virtue of her employment or office. Defendant's diversion of check belonging to the law firm which employed her into her personal account constituted embezzlement; embezzlement was established simply by the defendant's wrongful and fraudulent taking of money received for her employer.

**Virginia Cases - Unpublished**

***Darby v. Commonwealth,* May 20, 2014**
Court of Appeals of Virginia, unpublished

Danville: Defendant appeals her conviction for Credit Card Fraud on sufficiency of the evidence.

*Facts:* Defendant opened a credit card in her former husband's name, without his knowledge or permission, but listed herself as an authorized user of the account. At trial, the defendant argued that she did not violate the credit card theft and fraud statutes because the card was issued to her.

*Held:* Affirmed. The Court distinguished the *Saponaro* case, where it reversed a conviction for an employee who used a credit card issued to him by his employer. Instead, the Court likened this case to the *Kovalaske* case, where the employee lacked permission to use the card and was therefore guilty of credit card fraud. In this case, the defendant's possession of the card was wrongful. The defendant did not have permission to open the account and obtained the card by fraudulent misrepresentation and was therefore guilty.

## V. Drug & Gun Offenses

**Virginia Cases – Published**

***Powell v. Commonwealth,* 62 Va. App. 579, 750 S.E.2d 229 (2013).**

*Facts:* An officer attempted to buy crack cocaine from the defendant, using common street slang and in the typical manner of illegal drug transactions. Defendant instead sold quetiapine, a Schedule VI controlled substance, to the officer. Although the "white rock substance" was given to the officer in a knotted baggie, the defendant argued that the Commonwealth had insufficient evidence to prove that

appellant made express or implied representations that the substance was cocaine or would be mistaken for cocaine.

*Held:* In a prosecution for distribution of an imitation controlled substance, the Commonwealth must prove the substance is not a controlled substance subject to abuse. Appearance and packaging of substance presented to undercover officer, coupled with defendant's representations with respect thereto, established that substance was presented in such manner as to cause officer to mistake substance for crack cocaine, as required to support conviction of distribution of an imitation controlled substance. Classification of the substance actually sold by defendant to undercover officer as a Schedule VI controlled substance under Drug Control Act was sufficient to establish that substance was not subject to abuse since potential for abuse was not a factor considered in connection with Schedule VI classification.

***Doulgerakis v. Commonwealth,* 61 Va. App. 417, 737 S.E.2d 40 (2013).**

*Facts:* Defendant was stopped for a traffic violation and told the officer he had a handgun in the glove compartment. The officer removed the handgun inside the latched, but unlocked glove box, and charged defendant with carrying a concealed weapon without a permit.

*Held:* A handgun kept in an unlocked, but latched glove compartment of defendant's vehicle was "secured in a container or compartment," within meaning of statutory exception to possession of concealed weapon statute and thus was not a concealed weapon. Glove compartment need not be locked for exception to apply.

***Barlow v. Commonwealth,* 61 Va. App. 668, 739 S.E.2d 269 (2013).**

*Facts:* Responding to a report of fired shots, the officer witnessed defendant remove a dark object from his waistband, and attempt to flee. Defendant was found under a parked vehicle, and a firearm was found under a utility trailer. The gun was "somewhat rusty" had no gun oil on it, and its barrel was not found. Defendant claimed that the instrument was simply consisted of firearm components, and did not have the main characteristics of a firearm.

*Held:* The fact that pistol was missing barrel and had some rust did not change its status as a firearm designed, made, or intended to expel projectile by means of explosion as required to support conviction for possession of firearm by convicted felon, in view of expert testimony that barrel could be easily replaced, and evidence that magazine loaded with five bullets matching pistol was found in close proximity to pistol. No evidence was presented that the gun was in such a state of disrepair that it had lost the essential character of being designed, made, or intended to expel a projectile by means of explosion.

***Smith v. Commonwealth,* 61 Va. App. 690, 739 S.E.2d 280 (2013).**

*Facts:* When defendant entered home, he was holding a firearm at his side, and when victim began screaming, defendant immediately grabbed her, held the gun to her head, and told her to be quiet.

*Held:* Evidence was sufficient to support defendant's conviction for using a firearm in the commission of burglary. Implicit in the jury's verdict was a finding that the defendant used the gun during the entry to assist in subduing the victim as necessary. The fact that the defendant did not find it necessary to

actually point the gun in order to gain entry does not prevent a finding that he used it in the commission of a burglary.

***Foley v. Commonwealth*: March 25, 2014**
Court of Appeals of Virginia, Record No. 0619-13-3

Roanoke: Defendant appeals his conviction for Carrying a Concealed Weapon on denial of his affirmative defense that he was on his curtilage.

*Facts:* When police responded to a disturbance, they found the defendant standing in the middle of a dirt road holding a gun. Officers detained the defendant, searched him and found a concealed handgun. At trial, the defendant argued that he was on the curtilage to his dwelling. The road was the defendant's property, although it was subject to a non-exclusive easement. The road bisected the defendant's property, but his home was on one side and he testified that he used the property on the other side of the road just for storage and as a junk yard.

*Held:* Affirmed. The Court reviewed the exception in §18.2-308(B) that allows a person to carry a concealed weapon on the curtilage of their property without a permit. The Court then discussed the meaning of the word "curtilage" at length and found that it is an extension of the home that is so intertwined with the home that the law must provide it the same protection as the home itself. The Court found that whether the property was subject to a non-exclusive easement was not relevant. Instead, the Court looked to the area's use and connection to the home itself rather than its use by third parties. The Court found that §18.2-308(B) is an affirmative defense to the charge of Carrying a Concealed Weapon and that therefore the defendant had the burden to show that he was standing in an area habitually used for family purposes and the carrying on of domestic employment, and therefore within the curtilage of his home. In this case, the Court found that he failed to do so. The Court also took pains to distinguish the definition of "curtilage" in Fourth Amendment law from the definition it was adopting when interpreting §18.2-308, noting how those definitions are different.

**Virginia Cases – Unpublished**

***Robinson v. Commonwealth*, October 22, 2013**
Court of Appeals of Virginia, unpublished

Campbell: Defendant appeals his conviction for Possession of a Firearm by Felon on sufficiency of the evidence.

*Facts:* Defendant possessed firearms in a gun case in his residence. He showed the guns to his girlfriend and told her that they were his guns. Later, he assaulted his girlfriend and she called the police and told them about the guns. Police located the guns in a locked case in the basement, which was also locked. The keys were kept in defendant's mother's room in a place open to anyone's access. The defendant admitted to police that he knew that the guns were in the basement.

*Held:* Affirmed. The Court reviewed the facts in detail and noted that the defendant knew that the guns were in the residence, said that the guns belonged to him, and had easy access to the guns.

***Hawkins v. Commonwealth*, May 20, 2014**
Court of Appeals of Virginia, unpublished

Caroline: Defendant appeals his conviction for Manufacturing and Possession with Intent to Distribute Marijuana on sufficiency of the evidence.

*Facts:* Defendant grew marijuana near his home. Police seized a half pound of marijuana, including eleven plants and two jars inside his home, along with scales. The plants were well-supervised and at various stages of growth, each potentially yielding a pound of marijuana. At trial, the Commonwealth's experts testified that the evidence was inconsistent with solely personal use. The defendant argued that the marijuana was for personal use.

*Held*: Affirmed. The Court reaffirmed that, under *Monroe* and *Pierceall*, supervised growth of many marijuana plants indicates a continuing enterprise in the production and distribution of marijuana. The Court also rejected the argument that the mere presence of smoking devices precluded a finding of intent to distribute. The Court examined the totality of the evidence and found it sufficient to demonstrate intent to distribute.

***Wright v. Commonwealth*, May 20, 2014**
Court of Appeals of Virginia, unpublished

Portsmouth: Defendant appeals his conviction for Possession of a Firearm While in Possession With Intent to Distribute Marijuana on sufficiency of the evidence.

*Facts:* While the defendant possessed more than 1 pound of marijuana with the intent to distribute at his house, he engaged in a gunfight outside his house, suffered a gunshot wound, and went to the hospital. Police located the marijuana after he went to the hospital. On appeal, the defendant argued that his possession was not "simultaneous" as required by §18.2-308.4.

*Held:* Affirmed. The Court rejected the defendant's argument that he must actually possess the drugs and the firearm at the same discrete point in time. Instead, the Court reaffirmed that possession of a firearm is a continuing offense. The Court likened this case to the *Wright* case, where the Virginia Supreme Court affirmed a conviction under similar facts. The Court ruled that the defendant's possession, whether actual or constructive, was simultaneous.

## VI. DUI & Habitual Offender

### Virginia Cases – Published

***D'Amico v. Commonwealth*, February 27, 2014**
Virginia Supreme Court, ___ Va. ___, 754 S.E.2d 291 (2014)

Montgomery County: Defendant appeals his conviction for Refusal on admission of the Declaration of Refusal form.

Facts: Defendant, under arrest for DUI, refused a breath test. The officer had advised the defendant of implied consent but, when the officer read the defendant the "Declaration of Refusal" form, the defendant signed the form but stated that he wanted an attorney. At trial, the officer testified that he could not

remember whether he or a different officer read the form to the defendant. The defendant objected to the admission of the form.

Held: Affirmed. The Court rejected the defendant's argument that the Commonwealth must prove that the arresting officer read the "Declaration of Refusal" form in the first place. The Court read 18.2-268.3 and ruled that the procedural requirements of sections (B) and (C) of that code section do not add elements to the offense, which are instead set forth in section (A). Therefore, the Court found, the form is not required in order to establish the offense of Unreasonable Refusal. In this case, the evidence demonstrated that, under arrest for DUI, the defendant gave an insufficient reason to refuse the breath test and therefore ruled that the evidence was sufficient.

***Sarafin v. Commonwealth*, October 8, 2013**
Court of Appeals of Virginia, 62 Va. App. 385, 748 S.E.2d 641 (2013)

Charlottesville: Defendant appeals his conviction for DUI on sufficiency of the evidence and failure to grant certain jury instructions.

*Facts:* Defendant drove intoxicated and fell asleep in his car while it was parked on his private driveway with the key in the auxiliary position and only the radio turned on. The officer woke up the defendant, who turned off the power and stepped out. After she learned that the defendant was intoxicated, the officer arrested the defendant for DUI. The defendant claimed that he had been out, drank alcohol, returned home, drank more alcohol, and then went to his car where he turned on the radio and fell asleep. At trial, the defendant argued that under *Enriquez*, the fact that he had his key in the auxiliary position was not sufficient to convict him because in this case he was in his private driveway and not a public highway. He argued that he did not take "an action in sequence" to operate his motor vehicle or intend to activate the motive power of the vehicle. The defendant also asked the trial court to accept four instructions regarding the definition of "operation" that the trial court refused.

*Held*: Affirmed. The Court first noted that the code makes no distinction between private property and a public highway for purposes of guilt or innocence in a DUI case. The Court then reviewed previous cases and statutes where "operation" had been defined and noted that there is only a distinction between private property and public highways for cases involving the operation of mopeds.. Under *Ngomondjami*, the Commonwealth does not need to prove that the defendant intended to put his vehicle in motion. An "operator" of a car is defined as any person who either drives or is in actual physical control of a motor vehicle. The Court found that the use of "on a public highway" in the *Enriquez* holding was mere dicta and that under these facts, the evidence was sufficient. The Court specifically repeated that the statute does not require that the Commonwealth prove that the defendant intended to drive the vehicle.

***Patterson v. Commonwealth,* November 5, 2013**
Court of Appeals of Virginia, 62 Va. App. 488, 749 S.E.2d 538 (2013)

Waynesboro: Defendant appeals his conviction of DUI arguing that the trial court abused its discretion by admitting the certificate of analysis.

*Facts:* Officer stopped defendant for very erratic driving and almost causing a collision. Officer did not smell of alcohol but observed that defendant had watery, glassy eyes and was very unsteady on his feet. He repeatedly refused to take field sobriety tests. He was arrested for DUI, with the arrest report citing 'DUI – drugs.' Because Officer did not smell alcohol, she offered defendant a blood test, rather than a

breath test, even though the breath test was available. The lab tested only for alcohol, which came up at .16%.

*Held:* Affirmed. Defendant argued that the test results should be inadmissible because the breath test was available and he was physically able to take it. Court rejected the argument, holding that § 18.2-268.2 (C), not (B), was controlling.

***Case v. Commonwealth*, February 11, 2014**
Court of Appeals of Virginia, 63 Va. App. 14, 753 S.E.2d 860, (2014)

Loudoun: Defendant appeals his conviction for DUI on sufficiency of the evidence.

*Facts:* Defendant passed out while drunk in the passenger seat of his friend's car. His friend abandoned the car on the road, leaving the defendant unconscious in the passenger seat, with the motor running. Later, a civilian called the police because he had seen the defendant passed out behind the wheel, with the vehicle in gear and the defendant's foot on the brake. A police officer arrived and found the defendant, now in the driver's seat, slumped over the steering wheel.

*Held:* Affirmed. The Court first rejected the argument the Commonwealth had to disprove the possibility that someone moved the defendant into the driver's seat while he was unconscious. The Court then rejected the argument that the defendant was not legally responsible because he was unconscious, noting that voluntary intoxication is not a defense. The Court also ruled that the Commonwealth was not required to prove any *mens rea* to operate the vehicle in this case. The Court reaffirmed that the DUI statute exists to punish a defendant's drunken actions, not his intent.

**Virginia Cases - Unpublished**

***Hodges v. Commonwealth*, February 18, 2014**
Court of Appeals of Virginia, unpublished

Frederick: Defendant appeals his conviction for Habitual Offender on sufficiency of the evidence.

*Facts:* Defendant drove after having been declared a habitual offender and having a previous conviction for that offense. The Circuit Court had entered the habitual offender order in 1995. The order declared the defendant to be a habitual offender for 10 years and further provided that he shall not be granted a license until his privilege to drive has been restored as provided by law. At trial, the defendant argued that the order expired in 2005.

*Held:* Affirmed. The Court observed that the order restricted the defendant from obtaining an operator's license for ten years and until his privilege to operate a motor vehicle had been restored, meaning that unless he becomes restored, he remains a habitual offender. The Court held that the record contained no evidence that he had been restored and therefore the evidence was sufficient.

# VII. Indecent Exposure

**Virginia Cases - Published**

***Barnes v. Commonwealth,* 61 Va. App. 495, 737 S.E.2d 919 (2013).**

*Facts:* The defendant, a jail inmate, was standing by the bars at the front of his cell in first floor lockup, in open view to staff, other inmates, and to members of the public with authorized access. Defendant appeals his conviction and argues that he was not "in public" or "in any public place" at the time of the offense.

*Held:* A public place, as an element of indecent exposure and sexual display, comprises places and circumstances where the offender does not have a reasonable expectation of privacy, rendering foreseeable non-consenting public witnesses. Defendant's act of masturbation occurred in a public place, as required to support convictions for indecent exposure and sexual display. Defendant did not have a reasonable expectation of privacy where he was standing, and it was probable that a non-consenting witness would observe his conduct.

**Virginia Cases – Unpublished**

***Romick v. Commonwealth*, November 19, 2013**
Court of Appeals of Virginia, unpublished

Warren: Defendant appeals his conviction for Indecent Exposure, 3rd Offense on sufficiency of the evidence.

*Facts*: Police found defendant lying down inside a vehicle, parked behind a Holiday Inn, wearing a only women's white nightgown that was pulled up to his navel, exposing his genitals. The officer told the defendant to put some clothes on and the defendant complied. At trial, the defendant claimed that he had been attempting to put his pants on when the officer arrived.

*Held*: Reversed. The Court observed that did the defendant did not admit to having an obscene intent, he was not visibly aroused, and there was no evidence he was masturbating. Nor was there evidence that he had as his dominant purpose a prurient interest in sex. Therefore, the Court found that although the defendant's behavior was "bizarre," the evidence merely proved nudity, which by itself is not sufficient to support a finding of obscenity, and is therefore not indecent exposure.

***Maness v. Commonwealth*, May 20, 2014**
Court of Appeals of Virginia, unpublished

Newport News: Defendant appeals his conviction for Indecent Exposure on sufficiency of the evidence.

*Facts*: Defendant rode his bicycle wearing a thong down the city street in full view of children at 5:30 p.m. The thong barely covered his penis, exposed his public hair, and made his buttocks appear naked. To bystanders, he appeared completely naked.

*Held:* Affirmed. The Court reviewed the elements of §18.2-387 and §18.2-372 and concluded that, in this case, the defendant's conduct exhibited "a shameful or morbid interest in nudity." His exhibitionist behavior demonstrated a "prurient interest in sex" and went "substantially beyond customary limits of candor in description or representation of such matters" as required by §18.2-372. However, the Court repeated that not all public displays of nudity are violations of the code and that each case will turn on the facts.

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